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Court of Appeals
Division III
State of Washington

32779-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SEAN J. BATES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S AMENDED BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting S.J.'s statements to the forensic interviewer into evidence.
2. The court erred in imposing a sentence condition providing: "Do not use a computer or electronic device capable of accessing the internet without authorization." (CP 109)
3. The court erred in imposing a sentence condition providing: "Do not use a computer or electronic device capable of accessing the internet without authorization from your Community Corrections Officer and/or therapist." (CP 109)
4. The court abused its discretion in imposing discretionary legal financial obligations without considering the defendant's present or likely future ability to pay them. (CP 110)

B. ISSUES

1. The child made numerous statements during a forensic interview. The State failed to ask the child about any of those statements. Did the court violate the defendant's

rights under the Confrontation Clause by admitting the child's statements, in their entirety, into evidence?

2. Did the trial court exceed its authority in imposing a condition of community custody prohibiting unauthorized use of a computer or other device capable of accessing the internet in the absence of evidence of any relationship between internet use and the circumstances of the crime?

3. Did the court abuse its discretion in imposing discretionary legal financial obligations without considering the defendant's present or likely future ability to pay them?

4. Should this court exercise its discretion to review the defendant's challenge to the imposition of costs despite failure to raise this issue in the trial court?

C. STATEMENT OF THE CASE

A jury convicted Sean Bates of two counts of first degree rape of a child. (CP 96) His conviction is the product of statements the alleged victim, 7-year-old S.J., made to various relatives and eventually to an interviewer from the Benton County prosecutor's office.

S.J. told her cousin Aaliyah Valdez a guy at her grandma's licked her private spot. (RP 37)[1] Aaliyah told her sister Lucy that Mr. Bates had raped S.J. (RP 45) Samantha told Lucy that "Sean had lifted her upside down and licked her private girl area. And then there was another incident where Aaliyah – [S.J.] said that he stuck his finger in her butt and that poop came out." (RP 4) Lucy called her mother, Tiffany Jackson, and told her to come home, it was an emergency." (RP 45, 54) S.J. told Ms. Jackson that "[o]ne time he licked her vagina and another -- she said on the couch he licked her vagina and in the bathroom he put his finger in her butt and that there was feces, poop on his finger . . . ." (RP 55)

Ms. Jackson called her brother, S.J.'s father Brandon Jackson, and he went to his sister's home. (RP 242) S.J. told her father that "Sean had lifted her upside down and licked her private area and stuck his finger in her butt." (RP 243) Mr. Jackson took S.J. home to her mother, Savannah Moore. (RP 244) S.J. told her mother "I was raped" and "it was Sean." (RP 210) Ms. Moore asked S.J. "if he had put his penis inside her" and

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[1] Mr. Bates and S.J.'s grandmother, Tammi McKeeff, had worked together and had become friends over a period of about eight years. (RP 118-19) At the time S.J. made the allegations against him, Mr. Bates had been renting a room in Ms. McKeeff's home for about 18 months. (RP 120)

she said "no." (RP 211) Ms. Moore looked at S.J.'s bottom and did not see anything unusual. (RP 210-11)

Mr. Bates was charged with two counts of first-degree child rape. (CP 1-2)

Mari Murstig is a child interviewer with the Benton County Prosecuting Attorney's office. (RP 170) She interviewed S.J. a few days after S.J. told her cousin she had been touched. (RP 180) Ms. Murstig testified that S.J. told her "Sean had gone downstairs to play with his cell phone and he had taken her to the bathroom and he had pulled her pants down, turned her upside down, and licked her private part and butt. And she also told me he had put his finger in her pants." (RP 183) According to Ms. Murstig, later in the interview S.J. disclosed that "he had put his finger in her private parts on multiple occasions." (RP 183-84) Following Ms. Murstig's description of the interview, a videorecording of the interview was played for the jury. (RP 184; Exh. 30)

In the course of the recorded interview, S.J. appears to make numerous statements relating to the allegations against Mr. Bates. (Exh. 30) Some of her statements are inconsistent with statements attributed to her by other witnesses, and some are inconsistent with her own testimony. (Exh. 30) While the videorecording would have enabled the jury to observe S.J.'s demeanor while making the statements, they were not made

under oath and because she did not adopt them as her statements she was not subject to cross-examination as to their content.

S.J. told the jury Mr. Bates touched her front and back privates with his hand, sometimes on the inside and sometimes on the outside, in a way that made her feel uncomfortable. (RP 292) This happened when she was playing with his iPod and also once in the swimming pool. (RP 292-93) She testified that once, in the bathroom, "[h]e turned me upside down and licked my privates." (RP 294) She said this made her feel uncomfortable. (RP 294)

At the conclusion of S.J.'s testimony, the deputy prosecutor asked her whether she remembered talking to Ms. Murstig and telling her "what happened with Sean?" (RP 296-97) S.J. responded affirmatively. (RP 296-97) The deputy prosecutor did not ask S.J. to tell the jury anything about the content of her statements to Ms. Murstig. (RP 296-97)

The jury found Sean Bates guilty of two counts of first degree child rape. (CP 96) At sentencing, the court made no findings and provided no reasoning or justification for any aspect of the sentence imposed. The court imposed a sentence consisting of a minimum of 144 months' incarceration, an indefinite period of community custody, and legal financial obligations including court costs of $1,497.60. (CP 100-102, 110) The court imposed additional sentence conditions including the

following: "Do not use a computer or electronic device capable of accessing the internet without authorization" and "Do not use a computer or electronic device capable of accessing the internet without authorization from your Community Corrections Officer and/or therapist." (CP 109)

D. ARGUMENT

1. ADMISSION OF THE FORENSIC INTERVIEW VIOLATED THE CONFRONTATION CLAUSE.

The Confrontation Clause of the Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI. Confrontation Clause violations are reviewed *de novo. State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007) (*citing Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)).

Under the Confrontation Clause, testimonial hearsay is inadmissible unless either (1) the declarant testifies at trial or (2) the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004).

Testimonial statements include those "made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial." *State v. Fisher*, 130 Wn. App. 1, 13, 108 P. 3d 1262 (2005), *quoting Horton v. Allen*, 370 F.3d 75, 84 (1st. Cir.2004). A child's statements in the course of a forensic interview are testimonial. *State v. Beadle*, 173 Wn.2d 97, 110, 265 P.3d 863 (2011).

If a hearsay declarant testifies as a witness and is subject to full and effective cross-examination, hearsay is admissible under the Confrontation Clause. *California v. Green*, 399 U.S. 149, 158, 164, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (emphasis added). So long as the declarant is asked about the prior hearsay statement, the availability requirement of the Confrontation Clause is satisfied, even if the declarant denies or fails to remember making the statement:

> Indeed, if there is any difference in persuasive impact between the statement "I believe this to be the man who assaulted me, but can't remember why" and the statement "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier," the former would seem, if anything, more damaging and hence give rise to a greater need for memory-testing, if that is to be considered essential to an opportunity for effective cross-examination.

United States v. Owens, 484 U.S. 554, 559-60, 108 S. Ct. 838, 842-43, 98 L. Ed. 2d 951 (1988).

"Under *Owens* and *Green* the admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at

trial, is asked about the event *and the hearsay statement*, and the defendant is provided an opportunity for full cross-examination." *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (emphasis added); see *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 15-16, 84 P.3d 859 (2004).

In *State v. Price*, our Supreme Court held that a declarant is not unavailable if he or she testifies and "concedes making the statements" about which the witness testifies:

> The purposes of the confrontation clause are to ensure that the witness's statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness's demeanor. *(citation omitted)* The *Green* Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness *who concedes making the statements*, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." *(citation omitted)*

State v. Price, 158 Wn.2d 630, 639-40, 146 P.3d 1183 (2006) (*quoting California v. Green*, 399 U.S. 149, 158, 164, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)) (emphasis added).

Here, although the child was asked whether she told the forensic investigator about the alleged incident, she was not asked about her hearsay statements, she did not concede having made any of the statements reported by Ms. Murstig and thus she was not open to "cross-examination at trial as to *both* stories." 158 Wn.2d at 640. Accordingly,

the court erred in admitting statements made in the forensic interview into evidence.

An error is harmless if " 'it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (*quoting Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

While the videorecording would have enabled the jury to observe S.J.'s demeanor while making the statements, they were not made under oath and because she did not adopt them as her statements she was not subject to cross-examination as to their content.

The forensic interview provided the State with an opportunity to present additional statements from the alleged victim, which were in addition to, or inconsistent with, her testimony at trial. Thus the jury was presented with significant evidence about which S.J. could not be cross-examined. Given the additional unexamined testimony, this court cannot

conclude beyond a reasonable doubt that the child's out-of-court statements did not contribute to the verdict.

2. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO MOVE FOR MISTRIAL WHEN THE STATE FAILED TO MAKE S.J. AVAILABLE FOR CROSS-EXAMINATION AT TRIAL.

In failing to object to the State's failure to make S.J. available for cross-examination, defense counsel violated his client's right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

At the time Ms. Murstig testified to S.J.'s hearsay statements, defense counsel reasonably relied on the court's ruling that S.J. had the capacity to testify and the State's implicit intent to make S.J. available as a witness. Defense counsel's inability to cross-examine S.J. was not apparent until the deputy prosecutor concluded direct examination without asking S.J. about her statements to Ms. Murstig. Although defense counsel reasonably refrained from challenging Ms. Murstig's testimony and the admission of the video recording of S.J.'s out-of-court statements, once the State failed to make S.J. available for cross-examination as to the numerous statements she made in the forensic interview, defense counsel provided ineffective assistance in failing to move for a mistrial.

3. THE COURT LACKED AUTHORITY TO IMPOSE A CONDITION LIMITING MR. BATES'S ACCESS TO THE INTERNET.

An appellate court reviews *de novo* whether the trial court had statutory authority to impose specific community custody conditions. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "While RCW 9.94A.505(8) allows the trial court to impose and enforce crime-related prohibitions and affirmative conditions as part of a criminal sentence, that authority is circumscribed." *State v. Johnson*, 180 Wn. App. 318, 330, 327 P.3d 704 (2014) (citation omitted).

Conditions that do not reasonably relate to the circumstances of the crime, to the risk of reoffense, or to public safety are unlawful unless explicitly permitted by statute. *See State v. Jones*, 118 Wn. App. 199, 207–08, 76 P.3d 258 (2003).

> (10) “Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030.

“[A] sentencing court may not prohibit a defendant from using the Internet if his or her crime lacks a nexus to Internet use.” *State v. Johnson*, 180 Wn. App. at 330, citing *State v. O’Cain*, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). “Although the trial court’s prohibition on ‘conduct . . . during community custody must be directly related to the crime, it need not be causally related to the crime.’ ” *State v. Zimmer,* 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (alteration in original) (*quoting State v. Letourneau*, 100 Wn. App. 424, 432, 997 P.2d 436 (2000), *review denied*, 165 Wn.2d 1035 (2009)).

There was evidence that from time to time Mr. Bates let S.J. play with his iPod, apparently an electronic device, but no evidence that this

device was connected to the internet. (RP 46, 121-24, 139, 166, 204, 221, 291-92, 294, 306) The record lacks any support for an inference of any nexus between the offenses of which Mr. Bates was convicted and use of a computer or other device to access the internet. The conditions relating to use of any device to access the internet should be stricken.

4. REMAND IS APPROPRIATE TO ENABLE INQUIRY INTO AND CONSIDERATION OF THE DEFENDANT'S ABILITY TO PAY LFOS.

The imposition of legal financial obligations (LFOs) is governed by statute:

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160.

> RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). The record does not reflect that the sentencing judge made any inquiry into Mr. Bates's ability to pay any LFOs. (Sentencing RP 10) The court imposed a minimum sentence of 12 years' incarceration, and nothing suggests the

court's consideration of this factor in imposing costs. The imposition of court costs does not comply with statutory requirements. The remedy is remand to the trial court for a new sentencing hearing for inquiry into defendant's ability to pay. 182 Wn.2d at 839.

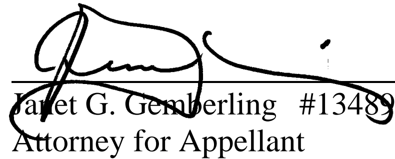
While an appellate court may refuse to review any claim of error which was not raised in the trial court, RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. 182 Wn.2d at 839. In *Blazina* the court opined that each appellate court must make its own decision to accept discretionary review. *Id.* But the court stated that national and local cries for reform of broken LFO systems demand that it exercise its RAP 2.5(a) discretion. *Id.* This court should agree and reach the merits of the issue in the present case.

E. CONCLUSION

Mr. Bates's conviction should be reversed and the matter remanded for a new trial at which he may receive effective assistance of counsel. Alternatively, the conditions limiting internet access should be stricken and this matter should be remanded for a new sentencing hearing at which the court shall comply with statutory requirements in considering whether to impose costs.

Dated this 13th day of August, 2015.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32779-5-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
SEAN J. BATES,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on August 13, 2015, I served a copy of the Appellant's Amended Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on August 13, 2015, I mailed a copy of the Appellant's Amended Brief in this matter to:

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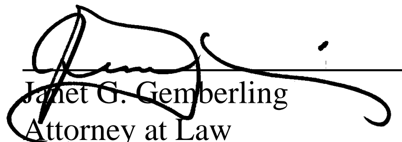
Signed at Spokane, Washington on August 13, 2015.



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